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Oregon Partner Law Blocked

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Ruling from judge with controversial role in '86 US sodomy case.

By: ARTHUR S. LEONARD | A federal district judge whose 2003 appointment raised the hackles of the gay community in Oregon because of his role in the infamous 1986 Georgia sodomy case has issued an order blocking Oregon's Domestic Partnership Act from going into effect this week.

District Judge Michael Mosman served as a law clerk to US Supreme Court Justice Lewis F. Powell, Jr. during the 1985-1986 term when the court, in *Bowers v. Hardwick*, upheld Georgia's criminal sodomy law. According to a leading Powell biography and news reports that circulated in 2003 when Mosman was nominated to the federal court in Oregon, he played a key role in persuading the justice to vote to uphold the Georgia law.

Mosman issued a temporary injunction on December 28 that will stay the effect of the new law at least until a February 1 hearing. As a result, couples gearing up to celebrate their domestic partnerships this week had to put their plans on hold, although gay rights activists in Oregon remain prepared to welcome another significant statute taking effect – a ban on sexual orientation and gender identity discrimination.

The Legislature passed the Domestic Partnership Act – a civil union law in all but name – last spring, with the enthusiastic support of Democratic Governor Ted Kulongoski. Opponents quickly vowed to seek a repeal by referendum, and collected more than the 55,179 signatures required to put the measure on the ballot in 2008, thereby blocking it from going into effect. However, after examining the petitions state election officials declared that enough signatures were invalid to defeat the effort.

The opponents went to federal court, represented by Alliance Defense Fund (ADF), a right-wing legal group that lends its support to anti-gay efforts, arguing that the method used by Oregon officials to invalidate signatures was flawed and violated fundamental voting rights protected by the federal Constitution. Their lawsuit was assigned to Mosman, who heard arguments and issued his ruling on December 28.

According to accounts of Mosman's role in the *Bowers* sodomy case, Justice Powell had expressed doubts about the constitutionality of the Georgia law to his clerks, and, in the Court's conference following oral argument of the case, voted preliminarily with four other members to create a bare majority to strike down the law. Apparently alarmed at this result, Mosman drafted a memorandum to Powell urging him to reconsider. Chief Justice Warren Burger also personally lobbied Powell to change his vote. A few days later, Powell did so, swinging the decision over to upholding the sodomy law.

When Mosman was nominated by President George W. Bush on the recommendation of Senator Gordon Smith, a Republican, gay rights proponents in Oregon loudly protested that he could not rule fairly in gay rights cases. Some expressed surprise that Smith, one of a handful of GOP senators generally supportive of gay rights, including as a co-sponsor of legislation, would support Mosman. In Mosman's defense, some suggested that his views have changed since 1986 and that he is not biased against gay litigants.

During the hearing on December 28, Alliance Defense Fund's attorney, Austin Nimocks, argued that the state's process for reviewing signatures was flawed because it invalidated signatures without giving the signers a chance to prove their validity. Nimocks argued that 9th Circuit precedent, binding on the Oregon district court, had equated the rights of petition signers with voter's rights protected by the Constitution, providing a basis for federal jurisdiction.

The 9th Circuit in recent years issued a series of decisions invalidating petition procedures in Idaho seen as favoring urban voters over rural voters regarding state ballot referendum requirements. After Nimocks submitted copies of those decisions, Mosman closely questioned the state's attorneys about the signature verification process and concluded Alliance had met the test for preliminary relief pending a full hearing on the merits. Integral to this finding was Mosman's conclusion that the petition signers' constitutional rights would be irreparably injured if the Domestic Partnership Act is allowed to go into effect before the merits of the case can be considered in a hearing.

The Oregon measure was one of two similar laws scheduled to go into effect this week, the other being the New Hampshire Civil Union Act.